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NO. 95603-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

MICHAEL DAVID HENDERSON,

Respondent.

BRIEF OF WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS AS AMICUS CURIAE

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I. INTEREST OF AMICUS

The Washington Association of Prosecuting Attorneys ("WAPA") represents the elected prosecuting attorneys of Washington State. Those persons are responsible by law for the prosecution of all felony cases in this state. Murder cases are among the most serious cases that they are responsible for prosecuting. In such cases, the Prosecuting Attorneys have a strong interest in ensuring that juries are given proper instructions that correctly set out the issues without being confusing.

II. ISSUE

Are instructions on excusable homicide ever helpful to the jury?

III. SUMMARY

The Supplemental Brief of Petitioner explains why instructions on excusable homicide were inappropriate under the facts of this case. It also argues that such instructions are *never* helpful to the jury. This amicus brief will address the latter argument.

In a homicide prosecution, the jury instructions should set out the elements of the charged crime and any applicable lesser included offenses. The instructions should also explain the rules

governing lawful use of force, if there is evidence to support such instructions. Depending on the circumstances, this could include instructions on use of deadly force, use of non-deadly force, or both.

Once such instructions are given, instructions on "excusable homicide" add nothing. They simply provide a name for acquittal based on the State's failure to prove the elements of the charged crime. In doing so, they invite the jury's consideration of several irrelevant questions. Since instructions on excusable homicide are confusing and provide no guidance to the jury, they should not be given.

IV. ARGUMENT

A. THE STATUTORY DEFINITION OF "EXCUSABLE HOMICIDE" NO LONGER MESHES WITH THE DEFINITIONS OF OTHER KINDS OF HOMICIDE.

As the petitioner's supplemental brief points out, the statute on "excusable homicide" is a historical relic. At one time, it was an essential part of the definition of manslaughter. Under the 1909 criminal code, manslaughter was defined as homicide that was not murder, justifiable homicide, or excusable homicide. Laws of 1909, ch. 249, § 143, codified as former RCW 9.48.060. Under that definition, a jury could not determine whether a person was guilty of

manslaughter without first deciding whether the homicide was excusable.

The code said that every homicide was either murder, manslaughter, excusable homicide, or justifiable homicide. Laws of 1909, ch. 249, § 138, codified as former RCW 9.48.010. That statement was true by definition. If a homicide was not murder, excusable, or justifiable, it was defined by former RCW 9.48.060 as manslaughter. There were no gaps between the statutory definitions of the different kinds of homicide.

This statutory scheme was, however, abandoned in 1975. Manslaughter was divided into two degrees, and both were given affirmative statutory definitions. RCW 9A.32.060 (first degree manslaughter), RCW 9A.32.070 (second degree manslaughter). To determine whether the elements of manslaughter are satisfied, it is no longer necessary to decide whether the homicide was excusable.

As a result of this amendment, the concept of "excusable homicide" no longer meshes with the substantive offenses. RCW 9A.16.030 defines excusable homicide as follows:

> Homicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means,

without criminal negligence, or without any unlawful intent.

The 1975 Criminal Code retained the statutory provision that all homicides are either murder, manslaughter, excusable, or justifiable. RCW 9A.32.010. Homicide by abuse was added to the list in 1987. Laws of 1987, ch. 187, § 2.[1] But this statutory statement is no longer true. There are now gaps between the statutory definitions. A homicide might not fall within any of them.

Excusable homicide requires that a person be "doing any lawful act by lawful means." There are, of course, unlawful acts that are not felonies. These include gross misdemeanors, misdemeanors,[2] and non-criminal violations such as traffic infractions. If a person is accidently killed as the result of such an act, the killing is not excusable. But if the act does not involve at least criminal negligence, the killing is likewise not murder, manslaughter, or justifiable homicide.[3]

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[1] Vehicular homicide has been a distinct crime since 1937, but it has never been part of this list. See Laws of 1937, ch. 189, § 120; RCW 46.61.520.

[2] According to one Court of Appeals decision, a killing that results from an intentional unlawful act is manslaughter. State v. Burns, 20 Wn. App. 72, 578 P.2d 554 (1978). Even if this is correct, there are numerous unlawful acts that do not require intent or criminal negligence.

[3] Vehicular homicide is another type of homicide that does not constitute murder, manslaughter, justifiable homicide, or excusable homicide. RCW 46.61.520.

Suppose, for example, a person carries a rifle in a vehicle, without checking whether it is loaded. The rifle accidently discharges, killing a passenger. Carrying a loaded rifle in a motor vehicle is a misdemeanor under RCW 77.15.460. This crime is a strict liability offense. State v. Pinkham, 2 Wn. App. 2d 411, 409 P.3d 1103 (2018). The person who carried the rifle therefore committed a crime, whether or not the person knew or should have known that it was loaded.

Since the person committed a crime, he or she was not "doing any lawful act" at the time of the death. The killing is therefore not excusable. Because the killing was accidental, it is not justifiable. State v. Brightman, 155 Wn.2d 506, 525 ¶ 37, 122 P.3d 150 (2005). Since there was no intent to kill, and no felony was committed, the killing is not murder. And if the person's conduct did not rise to the level of criminal negligence, the killing is also not manslaughter. The homicide thus fits within none of the statutory categories.

Because there are gaps between the statutory definitions, it is misleading to invite the jury to place the defendant's act in one pigeonhole or another. The act might not fit in any of them. The critical point is to define the crime that the defendant is charged

with, along with any relevant lesser offenses. If the defendant's act does not fit that definition, it does not matter what name it is given.

B. THE STATUTORY DEFINITION OF "EXCUSABLE HOMICIDE" ESSENTIALLY ASKS THE JURY TO CONSIDER ALL OTHER STATUTORY CATEGORIES, EVEN THOUGH SOME OF THEM WILL NOT BE BEFORE THE JURY.

In addition to the gaps that are inherent in the statutory definitions, additional gaps can arise from the jury instructions in particular cases. This is because the definition of "excusable homicide" contains language excluding *all* of the other statutory categories. In a particular case, the court may not instruct on some of the categories. When that occurs, that category will form an apparent gap between the charged crimes and the definition of "excusable homicide."

For example, when a defendant is charged with felony murder based on second degree assault, manslaughter is not a lesser included offense. State v. Gamble, 154 Wn.2d 457, 469 ¶ 18, 114 P.3d 646 (2005). The jury should therefore not be instructed on manslaughter. But if the jury is instructed on excusable homicide, they would be asked to consider whether the defendant was acting "without criminal negligence." A killing that is criminally negligent would not fall within any of the categories described in the

instructions. It is not murder, but it is likewise not excusable. It would be manslaughter, but that crime would not be addressed in the instruction. In effect, an instruction on excusable homicide asks the jurors to consider a crime that is not properly before them.

C. THE PRESENT CASE ILLUSTRATES HOW AN EXCUSABLE HOMICIDE INSTRUCTION INVITES THE JURY TO CONSIDER IRRELEVANT ISSUES.

The misleading nature of instructions on excusable homicide is illustrated by the present case. The murder charge was based on only one theory — killing in the course of second degree assault. CP 56, inst. no. 10. The jury was correctly instructed that an assault requires "unlawful force." CP 59, inst. no. 13. They were also correctly instructed that the use of force in self-defense is lawful. CP 60, 62, inst. nos. 14, 16. These instructions properly framed the issues that the jury had to decide. If the defendant committed a second degree assault and the other elements of murder were proved, he was guilty. If he did not commit a second degree assault, he was not guilty.

Under these instructions, a guilty finding would automatically preclude any valid claim of excusable homicide. Excusable homicide requires that the defendant be engaged in "any lawful act." Second degree assault is not a lawful act. So if the elements

of the crime were proved, the "defense" would be automatically disproved.

An instruction on excusable homicide would, however, invite the jurors to consider several irrelevant questions. To start, with, they would be asked to determine whether the defendant was "doing any lawful act by lawful means." The defendant's acts might have been "unlawful" in ways that did not constitute second degree assault. For example, there was evidence that he was committing the crime of unlawful possession of a firearm. That is not a "lawful act" — but it would not justify a conviction for murder under the instructions in this case.

An excusable homicide instruction would also invite the jurors to determine whether the defendant was acting "without criminal negligence." Again, this is an irrelevant consideration. Under the instructions in this case, the defendant's negligence would not justify his conviction for murder or any other crime. An instruction on excusable homicide would add nothing but confusion.

D. IN ALL KINDS OF CASES, EXCUSABLE HOMICIDE INSTRUCTIONS ARE BOTH SUPERFLUOUS AND CONFUSING.

The problems with excusable homicide instructions are not confined to the circumstances to this case. Rather, the problems

are universal. No matter what the charge is, an instruction on excusable homicide adds nothing to the instructions defining the crime. In every case, however, the excusable homicide instruction would invite consideration of irrelevant factors.

To begin with, consider a charge of premeditated or intentional murder. If the jury finds that the defendant acted with intent to kill, then he did *not* act "without unlawful intent." If the jury finds that all the elements of the crime were proved, that necessarily requires a finding that the killing was not excusable. But an excusable homicide instruction would invite the jury to consider whether the defendant was "doing any lawful act" — a consideration that is irrelevant to the charge of intentional murder.

Consider next a charge of felony murder. As discussed above, if the jury finds that the defendant committed the specified felony, then he was *not* "doing any lawful act." Yet the instruction invites the jury to consider whether the defendant committed some other kind of unlawful act, which might not even be a felony.

Finally, consider a charge of manslaughter. If the jury finds that the defendant acted recklessly or with criminal negligence, then he did *not* act "without criminal negligence." Yet, the instruction again invites the jury to consider whether the defendant

committed some unlawful act, which is irrelevant to the manslaughter charge.

In each of these situations, the excusable homicide instruction adds no relevant considerations beyond those set out in the "to convict" instruction. Yet in each, the instructions draws the jury's attention to other *irrelevant* considerations. Such an instruction is worse than useless.

E. WHEN THE DEFENDANT CLAIMS THAT THE KILLING WAS ACCIDENTAL, THE JURY MAY NEED TO BE INSTRUCTED ON THE STANDARDS GOVERNING NON-DEADLY FORCE — BUT INSTRUCTIONS ON EXCUSABLE HOMICIDE ARE STILL UNHELPFUL.

Special issues can arise in self-defense cases when the defendant denies acting with intent to kill. The issues stem from the existence of two different standards governing lawful use of force — one for deadly force, and one for non-deadly force. "A person is justified in using deadly force in self-defense only if the person reasonably believes that he or she is in imminent danger of death or great personal injury." State v. Read, 147 Wn.2d 238, 243, 53 P.3d 26 (2002). That restriction does not apply to non-deadly force.

The problem is that the use of non-deadly force can sometimes result in death. An example appears in Brightman. There, the defendant claimed that he used his gun in self-defense

as a club, but it accidentally discharged. Even though a person died, this court held that the defendant's acts did not constitute justifiable homicide. Rather, they could have been excusable homicide. Brightman, 155 Wn.2d at 526 ¶ 38.

In this kind of case, the jury instructions must clearly define the applicable self-defense standard. The solution is not, however, to introduce the confusing concept of "excusable homicide," with all of the excess baggage included in that definition. Rather, the solution is to focus on the elements of the charged crime.

If the sole charge is premeditated or intentional murder, the only applicable defense would be justifiable homicide. The intentional killing of another person necessarily involves the use of deadly force. An intentional killing is not "committed by accident," so it cannot be excusable. If the killing is intentional and not justifiable, it is murder. On the other hand, an unintentional killing is not intentional murder — whether or not the defendant's actions were otherwise lawful. If the charge is intentional murder, and the killing was not intentional, the lawfulness of the defendant's use of force is a distracting side issue.

More complex questions arise when the jury is instructed on manslaughter, as either a charged crime or a lesser included

offense. To prove manslaughter, the State must prove that the defendant was reckless or criminally negligent. RCW 9A.32.060(1)(a) (first degree manslaughter), 9A.32.070(1) (second degree manslaughter). A reckless or criminally negligent killing cannot be excusable. State v. Norman, 61 Wn. App. 16, 28, 808 P.2d 1159 (1991). But a person who acts in lawful self-defense cannot be "reckless" or act with "criminal negligence." For either mental state to apply, the person's actions must be "a gross deviation from conduct that a reasonable person would exercise in the same situation." RCW 9A.08.010(1)(c), (1)(d). Lawful self-defense cannot be such a deviation. State v. Hanton, 94 Wn.2d 129, 133, 614 P.2d 1280 (1980).

When a jury considers a manslaughter charge, it must be instructed on lawful use of force if that instruction is supported by the evidence. Depending on the facts, the applicable instruction could cover deadly force, non-deadly force, or both. The jury should be told that a death resulting from lawful use of force is not manslaughter. An additional instruction on "excusable homicide" is neither necessary nor helpful.

The final situation is a charge of felony murder, as in the present case. To prove felony murder, the State must prove that

the defendant attempted to commit a felony. RCW 9A.32.030(1)(c) (first degree murder), RCW 9A.32.050(1)(b) (second degree murder). For example, in the present case the State was required to prove that the defendant committed second degree assault. CP 56, inst. no. 10. An act done in lawful self-defense is not, however, second degree assault. It therefore cannot be the basis for a charge of felony murder. State v. Hendrickson, 81 Wn. App. 397, 400, 914 P.2d 1194 (1996).

In a prosecution for felony murder, the jury should be instructed on any available defenses to the underlying felony. Again, this could include lawful use of deadly force, lawful use of non-deadly force, or both. If such instructions are given, an instruction on "excusable homicide" is again neither necessary nor helpful.

This court has recognized the superfluous nature of instructions on excusable homicide:

> [T]he statutory definition of excusable homicide is merely a descriptive guide to the general characteristics of a homicide which is neither murder nor manslaughter. The characteristics of excuse do not have to be independently proved or found. Insufficiency of proof beyond a reasonable doubt of the mens rea of murder or manslaughter requires a finding of excusable homicide. Therefore, if a defendant wishes to argue excuse to the jury, he only

> needs to persuade the jury that the prosecution has not carried its burden because there is reason to doubt that the act was committed with a mental element of at least criminal negligence.

State v. Burt, 94 Wn.2d 108, 110–11, 614 P.2d 654 (1980). Other aspects of the holding in Burt were modified by this court in State v. McCullum, 98 Wn.2d 484, 656 P.2d 1064 (1983).[4] This portion of the holding, however, remains valid. State v. Baker, 58 Wn. App. 222, 226, 792 P.2d 542 (1990).

As this court recognized in Burt, the legal principles governing excusable homicide can be communicated to the jury by instructions on the elements of the charged crime and any applicable defenses. This is true in every kind of case. Defining the term "excusable homicide" adds nothing substantive. Such a definition is only a source of confusion. This court should plainly hold that an instruction defining "excusable homicide" should never be given.

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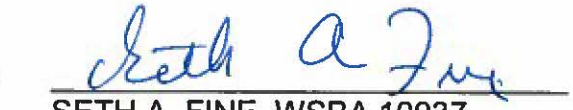
[4] In McCullum, the court disapproved prior cases holding that "the trial court need not instruct on the burden of proof for self-defense as long as the defendant could fully argue his theory of the case." McCullum, 98 Wn.2d at 499. Burt, however, did not involve any claim of self-defense.

V. CONCLUSION

This course should disapprove of the use of instructions on "excusable homicide." Such instructions are always both unnecessary and confusing.

Respectfully submitted on August 23, 2018.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 

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IN THE SUPREME COURT
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I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 23rd day of August, 2018, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office

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